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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Marine Pollution Control Corporation

**File:** B-270172

**Date:** February 13, 1996

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Thomas G. Rollins, Esq., for the protester.

Isaac Johnson, Jr., Esq., United States Coast Guard, for the agency.

Christine Davis, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Where offerors are required to propose on a firm, fixed-price basis in a negotiated procurement, a proposal, which does not contain an unequivocal offer to perform at a firm, fixed price, cannot be accepted for award.

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## DECISION

Marine Pollution Control Corporation (MPC) protests the award of a contract to DonJon Marine Co., Inc. under request for proposals (RFP) No. DTCG84-95-R-HYR752, issued by the United States Coast Guard, for the removal of oil from a sunken tank barge. MPC argues that the Coast Guard made various errors in evaluating its proposal, including determining that it failed to offer firm, fixed prices, and that the Coast Guard awarded the contract to a firm which suffers from an organizational conflict of interest.

We deny the protest.

The tank barge Cleveco sank in Lake Erie in 1942. The RFP requires the contractor to remove an estimated 164,750 gallons of oil from the barge, to sell or otherwise dispose of any recovered oil, and to clean the site. The RFP contemplated a combination firm, fixed-price and time-and-materials contract to perform these services. In this regard, the RFP pricing schedule contained four contract line items (CLIN); lump-sum, fixed-prices were requested for CLIN No. 0001, "Removal of Oil," and CLIN No. 0003, "Clean Up/Remediation Services." (The non-fixed-price, time-and-materials CLINs (Nos. 0002 and 0004) are not relevant to this decision.) The RFP provided for an evaluation of the realism and reasonableness of the prices proposed, and asked offerors to submit cost breakdown information for this purpose. The RFP established a "best value" evaluation scheme, in which technical quality was more important than price.

MPC's initial proposal provided prices for both fixed-priced CLINs, as well as cost breakdown information showing how it arrived at these prices. In the preface to its cost breakdown information, the protester stated that it had made assumptions regarding the site conditions it expected to encounter and it had estimated certain project costs based upon these assumptions. For example, the protester estimated that its vessels would consume 32,000 gallons of fuel; that it would pump 100,000 gallons of water in addition to the oil; that it would experience 3 "down days" owing to inclement weather; and that it would operate a MARISAT satellite-based communication system for a total of 20 hours. The protester stated that its proposed fixed prices did not account for costs in excess of the stated estimated quantities and that, "[i]f the requirements for each item exceed the amounts provided herein, then MPC will bill as extras the additional quantities per the unit pricing" provided in the cost breakdown information.

The agency determined that the protester had improperly qualified its firm, fixed prices. Consequently, the Coast Guard directed MPC during discussions to propose firm, fixed prices for CLIN Nos. 0001 and 0003 and advised MPC that "[o]nce the contract is awarded there will be no increases made to CLIN 0001 and CLIN 0003 as a result of inaccurate estimates on your part."

In response, the protester's best and final offer (BAFO) advised:

"MPC provided firm fixed price offers for CLINs 0001 and 0003. As stated in our proposal, assumptions had to be made with regard to various aspects of the work to be performed. While MPC did outline the assumptions made in our cost proposal, the two key factors that are truly beyond the control of MPC are inclement weather and the Coast Guard's use of the MARISAT unit. Inclement weather resulting in suspended operations will have a profound impact on overall project cost . . . While MPC can make assumptions as to how often the Coast Guard will choose to use the MARISAT unit, it is not possible for the contractor to accurately determine."

MPC also noted that its BAFO cost estimate included 4 "down days" for inclement weather; MPC's BAFO prices somewhat increased because MPC's initial proposal only accounted for 3 "down days." The Coast Guard determined that the protester continued to qualify its firm, fixed prices in its BAFO and that its proposal was therefore unacceptable.

In a negotiated procurement, a proposal which fails to conform to one or more of an RFP's material terms or conditions is technically unacceptable and cannot form the basis for an award. BEMW, Inc., B-238654.2, Aug. 9, 1990, 90-2 CPD ¶ 117; Cajar Defense Support Co., B-237522, Feb. 23, 1990, 90-1 CPD ¶ 213. The requirement for fixed prices is a material term or condition of an RFP requiring such pricing, and a

proposal that does not offer fixed prices cannot be accepted for award. Id. We find that MPC's offer materially deviated from the RFP's firm, fixed-price requirements and was properly rejected.

The protester advised in its initial proposal that "MPC will bill as extra" costs for certain items, which exceeded the cost estimates underlying MPC's proposed firm, fixed prices. By imposing this condition, MPC did not commit itself to providing all services at its proposed firm, fixed prices—a fact which MPC has not disputed during the course of this protest. During discussions, the Coast Guard invited MPC to cure the deficiency in its proposal by directing the firm to provide firm, fixed prices and warning the firm that the Coast Guard could not be billed extra if MPC's cost estimates proved inaccurate. Notwithstanding this advice, MPC did not retract the qualification made in its initial proposal. Instead, the protester reiterated that at least "two key factors" (inclement weather and the use of the MARISAT unit) were "truly beyond the control of MPC" and could have a profound impact on overall project cost. In our view, the agency reasonably interpreted this statement as qualifying the protester's firm, fixed prices, at least with respect to these "two key factors." Although the protester argues that its response was meant merely to explain why it increased its BAFO prices, we note that the Coast Guard asked the protester to retract an improper price qualification from its proposal and MPC's BAFO did not do so. Therefore, MPC's proposal was properly determined to be unacceptable.

MPC claims that the Coast Guard should have conducted another round of discussions to enable the protester to cure any remaining defect in its price proposal. We disagree. The agency carefully and explicitly explained during written discussions that MPC's proposal contained an improper price qualification and offered MPC an opportunity to withdraw that qualification in its BAFO. MPC declined to do so, and the agency was not required to afford it yet another opportunity to commit itself unequivocally to its firm, fixed prices. See Ways, Inc., B-255219, Feb. 17, 1994, 94-1 CPD ¶ 120.

Because MPC's proposal was properly determined unacceptable for failing to offer firm, fixed prices, we need not consider the protester's remaining allegations that the agency misevaluated its technical proposal or conducted an improper cost/technical tradeoff. See BEMW, Inc., supra.

Finally, MPC is not an interested party eligible to challenge the contract award on the basis that DonJon had an organizational conflict of interest. Under our Bid Protest Regulations, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to

award a contract. Bid Protest Regulations section 21.0(a), 60 Fed. Reg. 40,737, 40,739 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.0(a)). A protester is not an interested party where it would not be in line for award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. In this case, the agency evaluated four BAFOs and rejected two as technically unacceptable, including the protester's. Because there was another technically acceptable, reasonably priced proposal besides the awardee's eligible for award, MPC is not an interested party to challenge the award. See Advanced Health Sys.--Recon., B-246793.2, Feb. 21, 1992, 92-1 CPD ¶ 214.

The protest is denied.

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of the United States